No. 16,358

IN THE

United States Court of Appeals for the Ninth Circuit

HARRY H. MEISNER,
Appellant,
vs.
RELIANCE STEEL & ALUMINUM CO.,
a Corporation, and
SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Executor of the Estate of Thomas J. Neilan, Deceased,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANT'S REPLY BRIEF

HARRY H. MEISNER,
Plaintiff and Appellant, appearing
in Propria Persona,
2233 National Bank Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

INDEX TO AUTHORITIES CITED

IN THE

United States Court of Appeals for the Ninth Circuit

No. 16,358

HARRY H. MEISNER,
Appellant,
vs.
RELIANCE STEEL & ALUMINUM CO.,
a Corporation, and
SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Executor of the Estate of Thomas J. Neilan, Deceased,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANT'S REPLY BRIEF

There is none so blind as the man *who does not wish to see.*

Appellees claim their perusal of the records and briefs discloses no issues to be tried, leaving us to wonder if they would recognize an issue if one came up and bit them.

Can they read appellant's brief and still believe that the parties are in agreement on the facts in the case.

Do they, for instance, concede plaintiff's contention (Brief 10) that he had a commission agreement with the defendants for finding a purchaser for Reliance's assets. If not, there is an issue.

Do they concede (Brief 10) that plaintiff's half of the commission was to be paid to him direct. If not, there is an issue.

Do they concede (Brief 11) that plaintiff found a ready, willing and able purchaser. If not, there is an issue.

Do they concede that the proposed terms of sale were agreeable to defendants. We trust they do, because this was admitted in their Response No. 4 (R. 45). But if not, there is an issue.

Do they concede that the purchaser was willing and able to perform the purchase on the terms of Exhibit A. In this regard they stated (Response 6, R. 46) their lack of information to admit or deny; but assuming they do deny, there is an issue.

And finally, do they concede (Brief 13) that after Mr. Neilan's death they were unwilling to go through with the sale, although the purchaser remained ready and willing to complete the purchase. If not, there is an issue.

And we challenge defendants to show anywhere in the record, in the pleadings, in the interrogatories, in responses to requests for admission, in the affidavits, or by neglect to make denials, that plaintiff and appellant has in any degree abandoned, or weakened his position on the above contentions.

We fear that the appellees are weaving a very thin web to try to obscure the real and disputed issues in this lawsuit. But perhaps we are misjudging appellees: perhaps they are merely quibbling about the meaning of the word "issue". If so, we submit the following definition taken from *Donahue v. Susquehanna Collieries Company,* 138 Federal 2nd page 3—that "an issue is a material point affirmed by one party and denied by the other".

The primary issue is the question, did the defendants agree to pay plaintiff one half of a commission of 5% of the first million and 2½% of the excess of the net purchase price for the inventory and assets covered by the purchase and sales agreement with H. W. & G. Corporation. If they did not, then what was the purpose of the wording, "This will confirm our understanding", which Mr. Neilan used to begin the letter, Exhibit J (R. 90) which he prepared for Meisner's signature and addressed to himself—the letter which was enclosed in his letter, Exhibit J (R. 89). If there was no such agreement, how could Mr. Meisner confirm the understanding: and if, as contended by the defendants, the only commission agreement was between the defendants and Jack Moore, why was it necessary for Meisner to sign the letter at all, why did they not just make their agreement with Mr. Moore himself. If it was Mr. Moore's commission, how could Meisner agree to cut it in half; or why should it be made payable directly to Mr. Meisner instead of to Mr. Moore. The only possible explanation for Mr. Neilan's preparation of Exhibit J was that he was evidencing a direct relationship between the defendants and plaintiff Harry H. Meisner. Mr. Neilan's signature to the letter dated November 12th, 1957 (Exhibit H) enclosing and referring to the letter, Exhibit J, which he prepared for Meisner's signature and which fully outlined the terms of the commission

agreement, would be sufficient to comply with the California Statute of Frauds.

Straus v. DeYoung, U. S. D. C.-S. D. Cal. 1957 155 Fed. Supplement 215;
Searles v. Gonzales, 19 Cal. 426; 216 P. 1003;
Hayden Company v. Rubber Company, 84 Cal. App. 669; 258 P. 663;
Kennedy v. Mericnel, 8 Cal. App. 378; 97 P. 81.

Appellees have made no attempt to answer plaintiff's contention that by their refusal to go through with the sale the appellees have waived the condition regarding consummation of the sale. We therefore assume that they did not desire to controvert this point.

In their brief appellees argue that Exhibit B might not be enforceable against them. But we fail to see the importance of this objection as long as the purchasers remained willing to perform.

For all of these reasons, we believe that the action of the District Court in entering the summary judgment was erroneous and should be reversed.

Respectfully submitted,

HARRY H. MEISNER,
Plaintiff and Appellant, appearing in Propria Persona,
2233 National Bank Building,
Detroit 26, Michigan.